10050–10064 *Investigation*

10050 *Objective:* The purpose of the investigation is to ascertain, analyze, and apply the relevant facts in order to arrive at the proper disposition of the case. Among the items to be considered in the course of the investigation are the following:

a. Legal correctness of details on face of charge, such as proper identification of parties and applicability of section numbers

b. Jurisdiction of the Board (see secs. 11700–11708)

c. Timeliness of the charge

d. Determination of sources of factual materials

e. Gathering of the relevant facts

f. Legal analysis of available factual materials

g. Resolutions of conflicts in available factual materials.

The above order is used advisedly. In appropriate circumstances matters on this list need not be considered if the charge does not merit further action under earlier named factors. Specifically, invalidity of the charge, on the basis of factual errors on its face, obviates an investigation into the merits; so do lack of jurisdiction and untimeliness.

10051 *Time Goals for Processing Cases:* All unfair labor practice cases, priority C cases, and summary judgment 8(a)(5) cases should be processed in accord with the following time objectives:

A. *Unfair Labor Practice Cases Generally:*

	Stage	*Goal*
1.	From filing of charge to beginning of initial investigation	7 days
2.	From filing of charge to completion of investigation and Regional Office determination	30 days
3.	From Regional Office determination to implementation of the decision (issuance of complaint, withdrawal, settlement/adjustment, dismissal, submission to Advice); including former advice cases where such action must be taken within 15 days after return to the Regional Office	15 days
4.	From issuance of complaint to close of hearing	45 days

B. *Priority C Cases:*

10(l) Cases

	Stage	*Goal*
1.	From filing of charge to C.P.'s submission of evidence	24 hours
2.	From filing of charge to completion of investigation and Regional Office determination	72 hours: Regional determination should immediately follow the completion of the investigation.

3.	From filing of charge to filing of 10(l) petition in merit cases	After merit determination, if conduct continues or a resumption is threatened, etc., 10(l) petition should be filed ''without further delay.''
4.	From filing of charge to issuance of complaint in merit cases	5 days after filing of 10(l) petition.

10(j) Cases

	Stage	*Goal*
1.	From filing of charge and C.P.'s request or sua sponte a Regional Office determination that 10(j) relief is appropriate	Expeditious handling *at all* stages similar to that accorded 10(l) cases. (See G.C. Memo 77–9.)
2.	From authorization to filing 10(j)	48 hours (See G.C. Memo 76–63.)

C. *Summary Judgment Cases:*

	Stage	*Goal*
1.	From filing of charge to complaint	14 days
2.	From issuance of complaint to filing of Motion for Summary Judgment with the Board	20 days

10052 *Timeliness of Charge:* As specified in Section 10(b), no complaint is to be issued on matters occurring over 6 months prior to the filing of a charge *and* the service of a copy on the charged party if the charging party has actual or constructive knowledge thereof unless the charging party is in the armed forces. If the charging party does not have actual or constructive knowledge of the unfair labor practice, the period commences to run when the actual or constructive knowledge is obtained. *Don Burgess Construction Corp.*, 227 NLRB 765, 766 (1977).

If the individual is in the armed forces, the 6-month period commences on discharge from the service. See Section 10(b) of the Act. The same rule is applied to amendments where the amended allegations differ in substance from the existing allegations. In circumstances where the charging party is attempting to reopen a dismissed case by the filing of an untimely charge, see sections 10122.6 and 10122.7.

As indicated earlier, on receipt of the charge, the Regional Office serves a copy of the charge on all parties named respondent. Especially in cases where time of service is of the essence, the charging party should be informed that, although we routinely notify parties of the filing of a charge, the charging party is responsible for timely and proper service of the charge.

''Filing'' means that the charge has been received by the regional director or other Board agent. ''Service'' on the charged party is effected at the time of the placing of a copy of the charge in the mails or by actual delivery in person.

Where the charge reveals on its face that it is untimely, no investigation of the merits should be made. Where the date of the alleged violation does not appear on the face of the charge, one of the initial objects of investigation should be to determine the date. Where investigation reveals that no unfair labor practice occurred within the 10(b) period, further investigation of the merits is unnecessary.

10053 *Investigative Guidelines:* The General Counsel's Memoranda listed below contain specific instructions pertaining to the handling and investigation of certain types of cases:

Subject	*Memo No.*	*Date*	*Title*
8(a)(1)-*Dairylea*	78–59	9–19–78	Cases arising under *Teamsters Local 338 (Dairylea Cooperative)*, 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976)
	76–34	9–23–76	*Teamsters Local 338 (Dairylea Cooperative)*, 219 NLRB 656 (1975), Casehandling Procedures
8(a)(1)-Information Cases	79–22	4–9–79	*Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979)
8(a)(1)-No-Solicitation, No-Distribution Cases	79–76	10–5–79	Guidelines for handling no-solicitation, no-distribution rules in health care facilities

Subject	*Memo No.*	*Date*	*Title*
	78–49	7–28–78	*Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978)
8(a)(1)-*Weingarten*	80–17	4–2–80	*Weingarten* rights in light of *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979), and *Roadway Express*, 246 NLRB 1127 (1979)
8(a)(5)	75–54	12–8–75	Guidelines to Regions for processing cases under *Trading Port*, 219 NLRB 298 (1975)
8(b)(1)(A)	79–55	7–9–79	Section 8(b)(1)(A) cases involving a union's duty of fair representation
8(b)(4)(A)	74–27	5–3–74	Section 8(b)(4)(A) and Section 8(e) cases involving the building and construction industry
8(b)(4)(D)	73–82	12–3–73	Guidelines for processing 8(b)(4)(D) cases and related 10(l) petitions
	78–33	6–9–78	Revision of G.C. Memo 73–82 concerning CD cases
8(e)	74–27	5–3–74	Section 8(b)(4)(A) and Section 8(e) cases involving the building and construction industry
	79–1	1–9–79	Effect of Board's recent decisions regarding the 8(e) construction industry proviso
8(f)	79–32	4–26–79	Guidelines for handling 8(f) cases
10(j)	76–63	12–23–76	Casehandling procedures in 10(j) cases
10(l)	75–18	4–22–75	Authorization of Regional Directors to process without clearance requests and application for temporary restraining orders in 10(l) proceeding—Guide for Processing
Collyer-Dubo cases	Unnumbered	5–10–73	Arbitration deferral policy under *Collyer*-revised guidelines
	73–52	7–30–73	*Collyer* deferrals of charges filed by individual employees
	77–58	5–25–77	Guidelines for handling *Collyer* cases in light of the Board's decision in *General American Transportation Corp.*, 228 NLRB 808 (1977)
	77–107	11–1–77	Financial hardship as a basis for nondeferral under the *Collyer* policy
	79–36	5–14–79	Procedures for application of the *Dubo* policy to pendency charging
Health Care	74–49	8–20–74	Guidelines for handling unfair labor practice cases arising under the 1974 nonprofit health care amendments to the Act
OSHA	75–29	6–24–75	Memorandum of Understanding with the Department of Labor concerning cases arising under Section 11(c) of the Occupational Safety and Health Act

Subject	*Memo No.*	*Date*	*Title*
	79–4	1–17–79	Memorandum of Understanding with the Department of Labor concerning cases arising under Section 11(c) of OSHA
Railway Labor Act	79–72	8–23–79	Jurisdiction of the National Mediation Board pursuant to Section 201 of the Railway Labor Act
Mine Safety	80–10	2–19–80	Memorandum of Understanding with the Mine Safety and Health Administration (MSHA), U.S. Department of Labor, concerning cases arising under Section 105(c) of the Mine Act
FOIA Guidelines	88–13	10–21–88	Freedom of Information Act

10054 *Scope*

10054.1 *In General:* The investigation serves as the basis for all action eventually taken in a case. It must, therefore, reveal the entire picture including pre-6-month material that might serve as background.

The investigation should adduce facts pertaining to the remedy as well as to the alleged violation. Appropriate documentary evidence and other material relevant to a remedy should be made a part of the Regional Office file and specifically identified concerning its purpose.

Early in case development, the field examiner or attorney should consider and research legal issues anticipated.

10054.2 *Violations of the Act Other Than Those Alleged:* Investigation should be limited to the allegations of the charge, matters relating thereto, and matters bearing on their truth or falsity. In the event the investigation indicates that violations not litigable under the charge may have been committed, the charging party should be given the opportunity to file appropriate amendments; in the absence of amendment, there should be no further investigation of the additional possible violations, unless they bear specifically on the truth or falsity of the allegations contained in the charge.

10054.3 *Violations of Other Federal Statutes:* Clearance with Division of Operations Management is not required before referring to other Federal or state agencies possible violations of other statutes, except the requirement of clearance would continue when the potential violation concerns possible criminal conduct related to Board proceedings (e.g., fraudulent authorization cards, perjury, or obstruction of justice in connection with NLRB proceedings). Similarly, the clearance requirement would continue prior to referral if alleged unethical conduct of attorneys is involved. (See sec. 11754.2(a).)

Persons who bring to the attention of any member of the regional staff evidence of possible violation of other Federal statutes, independent of our processes and not uncovered during the investigation of a case, should be referred to appropriate authorities.

10054.4 *Violations of Titles I–VI of Labor-Management Reporting and Disclosure Act:* Matters brought to the attention of any member of the regional staff that relate to possible violations of Titles I–VI of the Reporting and Disclosure Act should be referred to the nearest area office of the Labor Management Services Administration, U.S. Department of Labor.

Correspondence should be addressed to the area director. Notify the Division of Operations Management of each such referral.

10054.5 *Obstruction of Justice and Perjury Allegations:* Regional Office personnel should be sensitive to acts of obstruction of justice or perjury on the part of individuals involved in Board proceedings. Report immediately any acts of alleged obstruction of justice or perjury to your Assistant General Counsel. Appropriate cases will be referred by the Division of Operations Management to the Department of Justice for its consideration.

10054.6 *Allegations of Professional Misconduct of Attorneys Arising from Practice Before the Board:* Suspected violations of professional responsibilities by attorneys arising from their practice before the Board and in its proceedings should be referred to the Division of Operations Management. Appropriate cases will be referred to the Bar Association of the State in which the attorney has been admitted to practice.

10056 *Investigation of Unfair Labor Practice Cases and the Role of Board Agent:* In the investigation of cases, Board agents must remain completely neutral. As an impartial investigator, care must be taken not to convey a prosecutorial image, particularly when interviewing witnesses of the charged party.

10056.1 *Witnesses of Charging Party:* As soon as possible, the Board agent should arrange to interview witnesses of the charging party.

The initial letter to the charging party has requested an account of what happened. The contact should be made whether or not an answer to the initial letter has been received. If it has not been received, the Board agent at the time of the contact should remind the charging party of this fact and should insist on prompt receipt regardless of the fact that interview arrangements are being made. The burden of having witnesses available at a date that is the earliest available to the Board agent should be placed on the charging party. (But see sec. 10056.3.)

Where the Region has been advised that the charging party is represented by counsel or other representative, the charging party's counsel or representative, on request, should be permitted to be present during the interview of the charging party or any supervisor or agent whose statements or actions would bind the charging party. This policy will normally apply in circumstances where during the interview counsel or other representative does not interfere with, delay, or impede the Board agent's investigation.

The charging party, whether or not represented by counsel or other representative, should be ready to submit proof of the basis of the charges.

In the event the charging party initially delays in the presentation of evidence without good cause, written notice should be sent to the charging party, or to counsel, if represented, requesting presentation of evidence and reminding them of their duty to cooperate in the investigation and/or the submission of a withdrawal request by a certain date with the admonition that if the noted deadline is not met the charge will be dismissed for lack of cooperation. There are situations, e.g., ''stalling'' charges, where very prompt action will be called for. In appropriate cases and with the supervisor's approval, a ''proof deadline'' of 72 hours, or less, may be imposed.

See section 10634 regarding prohibitions on permitting the respondent's counsel to question discriminatees in compliance cases concerning their interim earnings and search for work.

10056.2 *Interviews of Witnesses:* Pursuant to the initial arrangements described above, the Board agent should meet with and interview witnesses offered by the charging party.

Wherever possible, the charging party's case, if one exists, should be established through interviews with the charging party and with witnesses offered by the charging party. Suggestions may be made by the charging party with respect to other witnesses or sources of information, but these should be adopted only on a showing of possible advantage therefrom; for example, a suggestion that the Board agent interview a number of named persons, perhaps unfriendly but at least inaccessible to the charging party, should not be undertaken unless the suggestion is fortified by a reasonable explanation of (a) what such persons would say, and (b) how it would be pertinent. It is the responsibility of the Board agent to avoid unnecessary expenditure of time and energy.

Where a witness, whether offered by the charging party or the charged party, who is not a representative or an agent of any party to the proceeding is represented by counsel or other representative and the witness requests that counsel or other representative be present during an interview, the interview should be conducted with counsel or other representative present so long as this presence does not delay or hamper the interview. This policy will normally not prevail where counsel or other representative also represents a party to the case unless the Region, in the exercise of its discretion, wishes to proceed with the interview under such circumstances. In the event the Region declines to proceed with the interview of the witness in the presence of counsel or other representative, the witness should be advised that he or she may submit documentary evidence or a statement that, if timely submitted, will be considered.

10056.3 *Interview of Potential Discriminatees Concerning Backpay Evidence:* The process of remedying unfair labor practices begins with the initial investigation of a potentially meritorious unfair labor practice charge. During the initial investigation of a charge, where the case appears to have merit, the Board agent should inquire of each discriminatee concerning his/her interim earnings and search for work and should place this information in the file for use in settlement or compliance efforts (sec. 10269). Further, during the investigation, the Board agent should obtain for the file the address and telephone number of each discriminatee in the case. Potential discriminatees should be advised of their obligation to search for work and to report all interim earnings, inasmuch as a failure to do so may result in a loss or reduction of any backpay to which they might be entitled in the event that their case is found to be meritorious. They should also be advised to keep written records of their search for work and interim earnings. The affidavit of each alleged discriminatee should contain information relevant to the backpay and reinstatement entitlements, such as rate of pay, wage history, current job classification and duties, job history, current shift hours, average hours worked, and, if possible, the name of a coworker similarly situated to the discriminatee prior to the alleged discrimination.

10056.4 *Pertinent Lines of Inquiry Should Be Exhausted:* All promising leads should be followed. It is the responsibility of the Board agent to take steps necessary to ascertain the truth of the allegations of a charge. The Board agent should exhaust all lines of *pertinent* inquiry, whether or not they are within the control of, or are suggested by, the charging party. (As indicated earlier, the charging party's burden is limited to that of full cooperation within its means.) In close cooperation with the supervisor, the Board agent should take all investigative steps, short of ''fishing,'' in areas reasonably calculated to bring results. Where necessary, the investigative subpoena should be used (*Subpoenas*, secs. 11770–11806). Depositions may not be used in connection with precomplaint investigations (*Depositions*, sec. 10352).

In cases involving postsettlement unfair labor practice allegations, activity prior to a settlement agreement may be considered in assessing a respondent's postsettlement conduct.

10056.5 *Obtaining Evidence from the Charged Party:* Only when the investigation of the charging parties' evidence and pertinent leads *point to a prima facie case* should the charged party be contacted to provide

evidence. In such cases the procedures in section 10056.6 should be followed.

Further, when communicating with charged parties to obtain evidence, Board agents should generally describe to representatives of the charged party the nature of the allegations under investigation. With respect to disclosure, Board agents should relate the basic contentions that have been advanced with regard to the various violations alleged. For example, when the charging party's evidence points to a *prima facie* 8(a)(1) violation involving threats of discharge, the Board agent should disclose such information as the general nature of the conduct (e.g., threat of discharge) and the general locale and the identity of the supervisor involved, as well as the date of the conduct. Such disclosure of the general nature of the conduct under investigation may be a decisive factor resulting in the charged party's cooperation in the investigation.

If the case under consideration involves a question of law and fact, the Board agent should also candidly disclose the legal theories that are under consideration and invite the charged party to file a statement of position or memorandum of law in addition to making witnesses available or submitting evidence.

In addition to being more apt to cooperate during the investigation, it has been our experience that charged parties are also more willing to discuss settlement when they are well informed concerning the basis of the allegations of the unlawful conduct and the legal issues that are in dispute. Where, however, in the Region's judgment the possibility of cooperation or settlement is remote, communications with the charged party may be somewhat more circumscribed.

10056.6 *Interviews of Respondent and its Agents:* Every attempt should be made to interview main representatives (corporate officers, international representatives) of the charged party.

Supervisors at all levels in a CA case and union agents in a CB case should also be interviewed if they possess relevant knowledge. If possible, such statements should be reduced to signed affidavits or at least written form.

Where the respondent is represented by counsel or other representative and cooperation is being extended to the Region in connection with its investigation of unfair labor practice charges, the charged party's counsel

or representative is to be contacted and afforded an opportunity to be present during the interview of any supervisor or agent whose statements or actions would bind a respondent. This policy will normally apply in circumstances where: (a) the charged party or the latter's counsel or representative is cooperating in the Region's investigation; (b) counsel or representative makes the individual to be interviewed available with reasonable promptness so as not to delay the investigation; and (c) during the interview counsel or representative does not interfere with, hamper, or impede the Board agent's investigation. In cases involving individuals whose supervisory status is unknown, this policy would not be applicable.

This policy does not preclude the Board agent from receiving information from a supervisor or agent of the charged party where the individual comes forward voluntarily, and where it is specifically indicated that the individual does not wish to have the charged party's counsel or representative present. In those cases in which the witness does not object to the presence of counsel, the appointment for an interview should be made and counsel advised of the date, time, and place of the interview.

It is noted, however, that *former* supervisors, etc., are not agents of the respondent after the supervisory relationship has been severed. Thus, the respondent's counsel does not have the right to be present when a *former* supervisor is interviewed. In this regard, Rule 801(d)(2)(D) of the *Federal Rules of Evidence* states that an admission is ''a statement by the party's agent or servant concerning a matter within the scope of his agency or employment, *made during the existence of the relationship.*'' (Emphasis supplied.) See *Southern Maryland Hospital,* 288 NLRB No. 56 (Apr. 14, 1988). See also *S.E.C. v. Geon Industries,* 531 F.2d 39 (2d Cir. 1976). Further, section 10056.2 is applicable with respect to the handling of matters when the former supervisor is represented by counsel.

10056.7 *Rank-and-File Employees and Unbiased Third Parties:* All others (rank-and-file employees, union members) known or believed to have knowledge of the facts in question should be interviewed. Unbiased third parties are apt to be the most fruitful sources of information. Questions opened up by investigation of the ''defense'' case should be pursued even if reinterviews of witnesses are required.

10056.8 *Pertinent Records and Documents:* All pertinent records and documents should be examined. If possible and desirable, originals or copies should be included in the files.

If authorization cards have been submitted in, for example, an 8(a)(2), 8(a)(5), or 8(b)(3) case, they should be date-stamped on the reverse side when received. All undated cards should be stamped ''UNDATED'' in the space where the date would ordinarily appear. If they must be returned at an early stage, or if, for any other reason, a permanent record appears desirable, they should be photostated.

10056.9 *Maintain Running Record of Activities:* Throughout the investigation, the Board agent should maintain, in the form of memos, a running record of agent's activities in the matter.

10057 *Monitoring Charged Party's Ability to Comply with Remedy to be Sought in Potentially Meritorious Cases:* At all times during the processing of potentially meritorious or meritorious charges, the Board agent should be alert to and continually assess the charged party's current ability and, when possible, future ability to comply with the remedy to be sought by the Agency (see Compliance Manual, sec. 10505). Any issues of potential inability to remedy the alleged unfair labor practices should be promptly and thoroughly investigated. The investigation may be triggered by the following actions:

a. Claim of inability to pay or otherwise comply

b. Creation of an alter ego

c. Sale or potential sale of all or part of business

d. Potential or actual successor

e. Siphoning of assets

f. Voluntary or involuntary bankruptcy

g. Closure of operation.

Following the investigation of these issues, it may be appropriate to seek protective relief (see Compliance Manual, sec. 10643) or take other appropriate action, such as to seek amendment of the charge, to name other

charged parties, including any alter ego, successor, individual, or trustee in bankruptcy, as derivatively liable for remedying the alleged unfair labor practices. Charging party and witnesses, whose potential remedial rights may be affected, should be advised to notify the Board agent immediately of any significant change in the respondent's operation, identity, or financial condition so that appropriate action can be taken.

10058 *Authorization Cards:* In all proceedings before the Board, only evidence that the General Counsel has reason to believe is true and authentic is offered.

It is mandatory upon Regions to establish the authenticity of authorization cards before issuance of complaint. In the course of pretrial preparation all evidence relevant to proving the General Counsel's case, including the availability of necessary witnesses, will again be reviewed.

Further, in pretrial preparation after issuance of the complaint, based on such a presumption, the Region should investigate (see secs. 10057.1–10057.4, *infra*) the authenticity of the cards and majority status independent of the presumption because it is always possible that the respondent, pursuant to subpoena, will produce the relevant materials and disprove the authenticity of the authorization cards. Of course, where the postcomplaint investigation of the authenticity of the authorization cards discloses that the union did not possess majority status, the Regional Director should reconsider and, where appropriate, withdraw the allegations of the complaint affected.

10058.1 *Investigating Authenticity:* The means of carrying the burden of proving the authenticity of authorization cards will vary from case to case. In certain cases it may be necessary to have signers authenticate their cards as to execution and purpose, while in other situations the credited testimony of the solicitor or witnesses will suffice. Where, despite diligent effort, the Region cannot locate or make available card signers or qualified witnesses, it may be necessary to use expert testimony to establish the validity of the cards. Whatever the method, it is incumbent on the Region in every case to make whatever investigation is reasonably required to insure the validity of the cards that it intends to submit as evidence in support of the General Counsel's case.

10058.2 *Investigating Authenticity in Remedial Bargaining Order Cases:* In all remedial bargaining order cases, information should be procured from the charging party setting forth the facts and circumstances relating to the solicitation and procurement of cards. This information should identify those persons, such as union agents and organizers, who will be able to authenticate cards and such information should serve as the basis for further investigation by the Region. Thereafter, an affidavit should be obtained from such persons relating to the cards that they can authenticate. Whenever cards cannot be authenticated in this manner, the individual card signers should be contacted and a statement taken from each of them.

10058.3 *Other Means of Investigating Authenticity:* Seeing each card signer may pose a time-consuming investigative problem, particularly in remedial bargaining order cases involving large units. In such circumstances, signature checks against payrolls and W-4 forms or the use of a questionnaire mailed to each card signer might facilitate investigation of the authenticity of cards. Responses to such questionnaires would also identify further areas of regional investigation.

10058.4 *Investigation of Majority Status:* It is also incumbent on the Region to prove that the signers of valid authorization cards constitute a majority of the employees in an appropriate unit. Absent other probative evidence upon which the size of the unit and the ensuing majority status of the union can be based, an appropriate payroll should be secured from the employer. When the employer has refused a Regional Office request to submit a payroll list to facilitate proof of majority status and the Region is of the view that production of such a list is appropriate to facilitate such proof, it shall subpoena such payroll list or other relevant data bearing on the unit issue. If the employer fails to honor such a subpoena, the Region should consider subpoena enforcement proceedings *prior to the the issuance of the complaint.*

10058.5 *Evidence of Forgery:* Whenever investigation as to the authenticity of authorization cards discloses evidence of forgery, Washington should be notified of the situation for the purpose of referral to the Department of Justice for further appropriate action. At the same time, further processing of the case should be suspended pending advice from Washington with respect to further handling of the case.

10059 *Techniques*

10059.1 *In General:* In this area, action must fit circumstances. Precise devices for each case must be adopted pursuant to consultation between Board agent and supervisor. The following are offered as guides.

Two factors are worth noting at the outset. (a) The true facts of a situation are more likely to be ascertained if the investigation is made *promptly*, before there has been sufficient time for loss of memory or for deliberate falsification. (b) Of immense value, where they can be obtained, are the *written positions* of all parties.

Ascertainment of the basic facts is best accomplished by private interviews with persons having knowledge of the circumstances and by examination of pertinent records. For purposes of investigation, *joint* conferences of the parties accomplish very little, although they may have some value in voluntary disposition of cases (see Techniques of Settling, sec. 10128), or another possible exception to this rule may exist in the ''technical'' 8(a)(5) case where factual issues may be narrowed.

10059.2 *Affidavits or Statements:* The keystone of the investigation is the *affidavit*. Every effort should be made to reduce statements of witnesses, friendly or hostile, to affidavit form. Extreme care should be taken by the Board agent in recording the facts given by witnesses. In no case should the Board agent interview a witness not a representative of a party (secs. 10056.1, 10056.2, 10056.6) in the presence of the party or its counsel without permission of the Regional Director or his/her designee and without ascertaining in private that such nonprivate interview represents the witness' bona fide desire and a sine qua non of his/her testifying. (Otherwise the Board agent could become party to a party's pretrial discovery interrogation where without notice it summons an unwilling or unconsulted witness to the interview site and then coercively surveils and/or listens to his/her conversation and testimony to the Board agent without the witness' meaningful and considered consent.) Copies of an affidavit should be given, on request, to the witness signing any such affidavit; copies of affidavits should not be given to persons other than the respective affiants themselves prior to hearing. (For production of affidavits during the hearing, see sec. 10394.7.)

When efforts to procure a sworn statement have failed, a signed or initialed statement should be sought.

In circumstances where the affiant refused to execute the affidavit under oath, the affiant should be advised of the option to affirm and sign the affidavit. Finally, even though swearing and signing are refused, a ''first-person'' statement should be prepared as part of a memo outlining the circumstances of the interview, the reasons for the interviewee's refusal to swear and/or sign.

When affidavits or statements have been submitted by non-Board personnel (e.g., by the charging party), the witnesses should be reinterviewed on all pertinent points; they should not be asked merely to reswear to the accuracy of the previously submitted materials. (See secs. 10056.2 and 10056.6.)

With respect to release of affidavits to counsel or other representatives, affidavits may be released in the following circumstances:

a. When the Region has been officially advised in writing that the charging party or charged party is represented by counsel or other representative, a copy of the client's statement will be provided to the counsel or representative on written request of the client.

b. When a witness, who is not a representative or an agent of any party, provides a written designation of a counsel or other representative who *does not* also represent a party, a copy of the witness' affidavit or statement should be provided to the counsel or representative on written request of the affiant.

Although, as indicated, this policy will normally not prevail in cases when counsel or other representative also represents a party to the case, Regional Directors do have discretion to honor such a request when the Director deems it appropriate. Cf. sec. 10056.2.

10059.3 *Avoid Group Interviews:* Even though a number of witnesses might have knowledge of the same incident, *group interviews* and *mass affidavits* should be avoided. The degree to which concerted questioning may serve to eliminate minor discrepancies is usually outweighed (a) by the ''corrective'' pull on each participating witness, and (b) by the possibility that any such witness will fail to make an individual contribution that would be offered if interviewed privately.

10059.4 *Achieving Confidence; Site of Interview:* In achieving the confidence of the witness the Board agent must clearly convey that the agent is entirely neutral and merely seeks the truth, and otherwise create an atmosphere conducive to the elimination of fear. The site of the interview should be selected with this in mind; it should be, perhaps, the witness' home, the Board office, or a ''neutral'' location, if possible. (Where witnesses are interviewed on company premises or at union headquarters, care should be exercised so that the interview will not be used as a pretext for a general employee or membership meeting.) If necessary, sympathetic appreciation of the witness' position should be expressed; an appeal should be made to witness' sense of civic pride; and the individual should be reminded that the laws are made to protect persons like the witness but they are not self-effectuating.

A witness should be told, where appropriate, of the available protection in the form of Section 8(a)(4) and subpoena. A witness should *not* be told that it will never be necessary to testify or that we could provide ''protection'' under all circumstances. As for the confidential nature of the information, the witness should be told that the information will be used by this Agency (and may be made available to other Government agencies on appropriate request) and this would be its only use unless and until it becomes necessary to produce the evidence at a formal proceeding. At a formal hearing the Agency will continue its policy in open cases of disclosing affidavits, or portions of affidavits, which have been produced during the hearing pursuant to the Board's Rules and Regulations, Section 102.118. Further, the witness should be advised of the Agency's policy concerning disclosure of information pursuant to the provisions of the Freedom of Information Act (see *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)), of withholding disclosure of all affidavits, except as previously noted, so long as the case remains in an ''open'' status. When a case is ''closed'' the Agency will normally disclose all affidavits obtained from individuals who are not, at the time of disclosure, current employees of an employer involved in the case or in a unit represented by any union involved and/or members of those unions. See G.C. Memo 79–6 issued January 24, 1979.

Specific approaches depend on circumstances. While the witness should immediately be made aware of the Board agent's identity and mission, an informal atmosphere, at least at the outset, is most conducive to instilling confidence. Writing materials should be kept out of sight until needed. Narrative information, only occasionally interrupted by simply framed questions, should be encouraged.

(See Introduction, secs. 11770–11828, Subpoenas.)

10059.5 *Affidavits/Statements Reduced to Writing:* The affidavit or statement should be reduced to writing at an appropriate time during the course of an interview. Now, the witness should understand that the Board agent is memorializing the facts as the witness knows them, and that (if this has not already been done) the witness will be asked to sign and swear to the truth of what is being said. Affidavits or statements should be written in the first person. Although they need not be verbatim, they should, to the degree possible, contain language used by the witness. Opportunity to read and to make (initialed) corrections or additions should be given. Either at the beginning or the end of the dictated statement, the oath should be formally administered.

Any field examiner or attorney may administer an oath or affirmation. Both individuals' right hands upraised, the Board agent should receive an affirmative answer to the question, ''Do you solemnly swear/affirm that the statement you [are about to give will be] [have just given] is the truth, the whole truth, and nothing but the truth, so help you God?''

(A typical affidavit opens with ''Now comes [name] who, under oath/by affirmation deposes and says:''; contains the witness' address and phone number if any; and concludes with ''I have read the above [have had the above read to me], consisting of pages, and, under oath [or affirmation], say to the best of my information or belief it is true.'' The jurat—''Subscribed and affirmed to/sworn to before me at this day of ,''—is completed and signed in the presence of the witness. In addition to signing the affidavit, the witness should initial each page.)

In view of the fact that the affidavit may become public without the necessity of proceeding to a formal hearing (e.g., where the affidavits are attached to a petition for injunctive relief or where they are attached to a motion for summary judgment), the preamble to unfair labor practice affidavits taken by Board agents should contain the following statement regarding confidentiality:

> I have been given assurances by an agent of the National Labor Relations Board that this affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the affidavit may be subject to disclosure only in accordance with Agency policy.

10059.6 *Translation/Certification of Affidavits Taken in a Foreign Language:* When an affidavit is taken in a foreign language and the Regional Office has it translated into English, the translator should add the following certification at the end of the affidavit:

> I hereby certify that I am fluent in English and [insert name of foreign language being translated] and that the attached English language translation is an accurate translation of the attached [insert name of foreign language that was translated] language original affidavit.

Date [Type name of translator]

10060 *Credibility:* In the event of hearing, credibility questions may be critical. In view of this, the following points should be kept in mind.

On the basis of its investigation, the Regional Office is expected to resolve factual conflicts.

Often a factual conflict arises out of the misunderstanding of the questions or out of the conclusionary nature of the questions asked or the answers given. The repetition of questions in different forms may help to resolve the conflict. Emphasis should be placed on obtaining factual details rather than the opinions and conclusions of the witnesses. Probing into details otherwise deemed to be insubstantial may be called for in order to determine whether there is a propensity for a ''careless'' handling of detail.

Where a witness has been contradicted on a relevant fact since he/she last gave testimony, he/she should be reinterviewed. And, to the extent further reinterviews of witnesses will help to resolve the issues, they should be undertaken.

Finally, in situations where factual issues are close, it may be appropriate to have a reinterview conducted by a second Board agent (typically, an attorney assigned to the case).

It should be kept in mind that a witness' appearance and behavior at the time of interview, the existence or nonexistence of discrepancies in irrelevant details, and even the consistency of prior statements or the witness' general reputation are only *indicators*. Nor does an unwillingness to sign or to swear to the truth of a statement have significance except when related to the reasons for the refusal. The best indications of truthfulness lie in the *probabilities* inherent in a given story (as opposed to another story) viewed in the light of the *entire pattern* of available evidence.

In the infrequent case in which (a) applying all relevant principles, the Region is unable to resolve credibility, and (b) the resolution of the conflict *means the difference between dismissal and issuance of complaint*, a complaint should be issued. This is not to be construed, however, as permitting the avoidance of the making of difficult decisions.

10062 *Assignment of Attorney:* A case may be assigned to an attorney, in lieu of or in addition to an examiner, at the very outset of the case where the complexity of the case (e.g., a CC or a CD case), the patency of legal problems at the outset, or the availability of regional personnel indicates it.

Where a field examiner and an attorney are assigned to a case, or whenever two or more Board agents are assigned to a case or task, responsibility for progress should be specifically fixed by the assigning supervisor or supervisors. In the absence of notice to the contrary, responsibility for progress of a case assigned at its filing to a field examiner shall reside in the examiner until the responsibility is specifically shifted.

While an attorney is assigned to a case but is not responsible for progress, an attorney is the legal advisor and chief legal consultant and will, when necessary, interview witnesses or conduct other required investigation. While the field examiner is assigned to a case but is not responsible for progress, the field examiner will be available for any necessary investigative steps.

10064 *Amendments to Charge*

10064.1 *Preparation:* A charge is amended by typing ''Amended'' (or ''Second Amended,'' ''Third Amended'') before the word ''Charge'' in the regular charge form and by rewriting the contents of the charge to include the desired changes. An amendment merely referring to the existing charge and stating what is being added to or dropped from that charge is proper, but it is better form to repeat all allegations as amended.

10064.2 *Service of Copies:* Whenever amended charges are filed, copies are served by registered mail on the charged and other interested parties for whom service is necessary. Proof of service should be placed in the file.

10064.3 *Assistance in Connection with:* The charging party, on his/her own initiative and irrespective of developments in the pending investigation, may add to or subtract from his/her original, or last amended, charge. Assistance to the extent permitted in connection with original charges may be rendered in connection with the filing of such amendments.

10064.4 *Where Filed after Dismissal:* An amendment filed after dismissal of a charge should be docketed as a new charge, no matter how titled, and assigned a new number.

10064.5 *Where ULP not Specified in Charge Uncovered:* In cases where investigation uncovers unfair labor practices not specified in a charge, regional personnel responsible for the handling of a given case must determine whether the charge is broad enough to support complaint allegations covering the apparent unfair labor practices found.

If the allegations of the charge are too narrow, the charging party (or attorney of record) should be apprised of the deficiency in the existing charge and should be informed that it can be remedied by amendment. Should amendment not be filed, the case should be reappraised in this light, and the complaint issued, if any, should cover only matters *related* to the specifications of the charge.

The scope of the charge may be great enough to cover the practices found, but if, on the other hand, this is questionable, the Region should notify the charging party (or attorney of record) of the facts and of the potential deficiency. Here again, the charging party should be informed that he/she may remedy the situation by amendment. Absent amendment, the case must be reappraised and the eventual complaint, if any, should cover only matters supported by the allegations of the charge.

Where appropriate, when a charging party (or attorney of record) is advised that amendment of a charge is desirable, he/she should be apprised of the effect of the suggested amendment as well as the effect of failure to amend and he/she should also be advised specifically that, in the event he/she declines to file an amended charge, the Board will proceed to process the meritorious allegations of the charge.

(Where the investigation discloses that an unnamed party has committed or has participated in the commission of companion unfair labor practices, the charging party should be apprised of his/her rights under the Act. For example, if the investigation of a CA case discloses the existence of ''companion respondents'' or the existence of a companion CB case, or vice versa, the charging party should be so informed.)

10064.6 *Where Other Parties May be Liable for Remedying Alleged Unfair Labor Practices:* When the investigation discloses that an unnamed party, such as an alter ego, successor, or individual, or trustee

in bankruptcy, may be derivatively liable for remedying the alleged unfair labor practices, the amendment of the charge should be sought to reflect the party as derivatively liable. (See secs. 10058, 10505, 10528.16, and 10643).

10064.7 *Where Unlawful Union-Security Clause Disclosed:* Where the investigation of a charge alleging a discriminatory discharge or refusal to hire discloses the existence of an unlawful union-security clause *in a contract*, by virtue of its terms, the clause should be attacked even though the charging party will not amend and even though the matters specifically alleged lack merit, provided that the allegations of the charge are sufficiently broad to cover the allegations of a complaint attacking the clause. Where, on the other hand, an apparently unlawful union-security *practice* is found in such a case, the charging party (or attorney of record) should be informed of this fact; if the party refuses to amend, the charge should be withdrawn or dismissed.

10064.8 *Amend to Correct Names, Drop Allegations, Cover Related Violations:* Amendments should be sought to correct errors in names of parties as revealed by the investigation. Also, when investigation indicates that allegations of a charge are without merit, an amendment *dropping* the allegations in question should be solicited; but this should not normally be done until the Region is ready to issue a complaint or to dismiss the allegation in question. Finally, amendments should be requested to

cover related violations occurring within each 6-month period subsequent to the last amendment.

(With respect to amending charges after a regional decision to issue a complaint, see sec. 10256.)

10100–10116 *Regional Decision*

10100 *Generally:* On completion of the investigation and the necessary legal analysis, a written or oral report should be submitted to the Regional Director who has the final authority and responsibility to reach a decision at the regional level. The Regional Director's final decision is reflected in the dismissal letter, complaint, or other document served on the parties.

On recommendation of the supervisor, or on their own volition, Regional Directors may decide that a case requires full legal research, in which event they may request same. Regional Directors may also decide to hold a meeting or agenda to discuss the issues with members of the regional supervisory staff such as the regional attorney, assistant to the Regional Director, and the supervisor assigned to the case, in addition to the Board agent who conducted the investigation and completed the legal analysis. It is expected, however, that the proportion of cases requiring separate legal opinion or full presentation and discussion at an agenda meeting will be small. The Regional Directors may also utilize subpanels consisting of the Board agent responsible for the investigation and designated members of the supervisory and managerial staff to initially discuss and review certain cases, especially where controlling precedent is clear, to assist him/her in reaching a final decision in such cases.

When the Regional Director determines that a meeting or agenda is appropriate or necessary, the meeting should be held as soon as possible. Except in emergencies, sufficient time should be given to permit the preparation of any necessary reports and analyses of the nature described in sections 10104–10108, and the reading or rereading of such reports and analyses, if in writing, by all participants in advance of the meeting.

The advance reading should eliminate the necessity of a repetition of the facts at the meeting or agenda. The examiner and the attorney responsible for the investigation or legal analysis should be prepared to answer any questions raised. Each person present should fully express his/her views and recommendations. The extent of consideration to be given each case will, of course, vary with its complexity.

On conclusion of the meeting, the Board agent assigned to the case should prepare as promptly as possible a brief memorandum of the discussion that concisely summarizes the meeting and crystallizes the principal issues.

The memorandum should be reviewed by the Board agent's supervisor, and may be circulated to other participants to assure its accuracy. It should then be submitted to the Regional Director to provide a written summary for consideration and evaluation of the relevant facts, arguments advanced, and views expressed by participants, the applicable law and, if appropriate, recommendations as to the remedial relief to be sought. The memorandum may be utilized by the Regional Director in reaching the ultimate determination that is reflected in the dismissal letter, complaint, or other dispositive action taken in the case. However, the Regional Director is not limited by the memorandum and may, where it is deemed appropriate, base this ultimate determination on other or additional grounds.

10102 *Recommended Withdrawals; Approvals:* On receipt of a withdrawal request (whether solicited or not), the Board agent responsible for the progress of the case must make a written or oral report, including a recommendation therein. The report shall include adequate reasons in support of the recommendation.

On receipt of the report, the Regional Director will take appropriate action.

10104 *Recommended Dismissals:* Oral or written reports recommending against formal action, whether based on lack of merit, the promise of certain remedial action by the charged party (''unilateral'' settlement agreements), or any other reason, should, as in other cases described above, be prepared by the Board agent responsible for progress of the case. The report should be somewhat more detailed than that involving a withdrawal or an all-party settlement agreement (if it involves a ''unilateral'' settlement agreement, for example, it should treat with the objections of the charging party to approval of the agreement), but it should be concise. A recital of efforts to procure a withdrawal request should be included.

After review by the supervisor, the report is submitted through appropriate channels for review and recommendations to the Regional Director. The case may be referred to an agenda presentation for further discussion and analysis, as described in section 10100.

10106 *Recommended Settlement Agreements:* Where all parties have entered into an agreement in settlement of a charge, the Board agent responsible for progress of the case will make a written or oral report and recommendation thereon. The report shall be concise, containing only the basic essentials. If the proposed settlement falls short of a full remedy, the deviation should be explained.

The agreement and report are transmitted through the supervisor for review. Here also the Regional Director may consult with the regional attorney, assistant to the Regional Director, and members of the supervisory staff.

For a detailed discussion of the settlement of cases, see sections 10124–10174.

For ''unilateral'' settlement agreements (i.e., those in which the charging party has not acquiesced), see section 10134.2.

10108 *Recommended Complaints:* A written or oral report recommending issuance of complaint should be prepared by the Board agent responsible for progress of the case.

The report whether written or oral should give the basic elements of the case, including the following:

a. Jurisdiction (details unnecessary; refer to file memos)

b. Labor relations history (relevant highlights only)

c. Factual chronology (sufficient facts should be set out so as to enable a regional determination. Credibility considerations with reasonings should be noted).

d. Conclusions and recommendations (with reasons)

e. Settlement efforts, if any

f. Discussion of the appropriate remedy.

Whenever necessary there will be a legal analysis.

The legal analysis should be concise; reference to the factual report will lead to an economy of wordage. But it should treat the legal adequacy of the facts, the legal principles involved, and the anticipated trial problems.

As in situations where dismissal is recommended, complaint recommendations may also be referred to an agenda for further discussion and analysis. (See sec. 10100.)

10110 *Other Recommended Action:* Regional office decision may be that advice of Washington be sought or that enforcement, backpay, or contempt proceedings be instituted.

A case falling within this item may be referred to a regional committee meeting at the option of the Regional Director.

10112 *Regional Committee Meetings:* The regional committee may consist of the Regional Director, assistant to the Regional Director, the regional attorney, assistant regional attorney, the examiner and/or attorney assigned to the matter under consideration, and the supervisor(s).

When it has been determined that a regional committee meeting is necessary, the meeting should be held as soon as possible. Except in emergencies, sufficient time should be given to permit the preparation of reports and analyses of the nature described in sections 10102–10110, and the reading or rereading of such reports and analyses, if in writing, by all parties in advance of the meeting.

The advance reading should eliminate the necessity of a repetition of the facts at the regional committee meeting. The examiner and the attorney should be prepared to answer any questions raised. Each person present should fully express his views and recommendations. The extent of consideration to be given each case will, of course, vary with its complexity.

A minute of the committee discussion and action should be prepared promptly by the participating attorney unless contrary instructions be given in a case. It should be as concise as possible, referring where necessary to the report and legal analysis. On completion, it may be circulated among the committee members and initialed by each of them. When it is concluded that complaint should issue, absent settlement, the agenda minute should reflect the fact that full consideration was also given to the remedy best suited to the facts of the particular case.

10114 *Regional Determination:* On the basis of the matters brought out in the report and/or analysis, or at any meeting or agenda, the regional Director makes a decision. The responsibility for action taken at the Regional level is the Regional Director's.

10116 *Limitations on Regional Action:* See submission to the Division of Advice or to the Division of Operations Management discussed in sections 11750–11756. Also, certain other manual sections require submissions in specific situations.